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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1970

70-116

DONALD A. DOWELL,
Petitioner

v.

BEECH ACCEPTANCE CORPORATION, INC.,
NEVADAIR COMPANY,
NORMAN LARSON COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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NORMAN LARSON COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioner, Donald A. Dowell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California rendered in this proceeding on November 16, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, reported at 3 Cal.3rd

544, appears at page 57 of the Appendix hereto. The opinion of the Second Appellate Division of the Court of Appeal of the State of California is reported at 84 Cal.Rptr. 654 and appears at page 29 of the Appendix. The opinion of the trial judge is unreported and appears at page 8 of the Appendix.

JURISDICTION

This judgment of the Supreme Court of the State of California was entered on November 16, 1970. A timely petition for rehearing was denied on January 14, 1971, and this petition for certiorari was filed within 90 days of that date. The order denying rehearing appears at page 71 of the Appendix. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTION PRESENTED

Whether the system of recordation of title to aircraft under §503 of the Federal Aviation Act of 1958, 49 U.S.C. §1403, affects priorities under state law between a prior security holder and a subsequent buyer in the ordinary course of business.

STATUTORY PROVISIONS INVOLVED

Section 101(17) of the Federal Aviation Act of 1958, 49 U.S. C. §1301 (17), set out in the Appendix at page 1.

Section 503 of the Federal Av tion Act of 1958, 49 U.S.C. §1403, set out in the Appendix at page 1.

California Commercial Code, §2403, West's Ann. Cal. Comm. Code, (West 1964) at Volume 23A, page 382, set out in the Appendix at page 6.

California Commercial Code, §9307, West's Ann. Cal. Comm. Code, (West 1964) at Volume 23C, page 501, set out in the Appendix at page 7.

California Commercial Code, §1201 (9), West's Ann. Cal. Comm. Code, (West 1964) at Volume 23A, page 48, set out in the Appendix at page 7.

STATEMENT OF THE CASE

The question decided by the Supreme Court of the State of California and which is presented in this petition is a federal question of substance not heretofore determined by this Court. The essential facts giving rise to the question are not in dispute.

Petitioner purchased a new Beechcraft Bonanza aircraft from a duly authorized Beechcraft dealer for a cash consideration of $30,000.00. Approximately two months later, respondent Beech Acceptance Corporation, Inc. (Beech) seized possession of the aircraft from petitioner, without petitioner's knowledge or consent.

Respondent Beech claims legal authority for the seizure under the following circumstances. The aircraft was manufactured by Beech Aircraft Corporation and sold by the manufacturer to respondent Nevadair Company (Nevadair), one of its distributors. Thereafter the aircraft was sold and delivered to Marion Tanger (Tanger), a duly authorized Beechcraft dealer, pursuant to a conditional sales contract. The contract provided that Tanger was not to sell the aircraft without respondent Nevadair's consent and that respondent Nevadair retained a security interest in the aircraft to the extent of the unpaid balance of the purchase price. Respondent Nevadair assigned its security interest to respondent Beech, and respondent Beech filed the conditional sales contract and the assignment with the Federal Aviation Administration pursuant to 49 U.S.C. §1403.

Petitioner purchased the aircraft from Tanger without inquiring as to the state of its title, though he knew of the federal recording system and had previously utilized title-search services before buying another aircraft from a private owner. His stated reason for failing to inquire about the state of title was:

> I didn't think it was necessary to pry into it because it was a brand new aircraft and it had ferry time only, and I was buying a new aircraft and he [Tanger] was an authorized representative of the Beech

> Corporation, so I thought it was like I was buying it from Beech directly.... If I bought it from an individual, which I did my first plane, I did check from Oklahoma [Federal Aviation Administration Aircraft Registry] to see if there was any encumbrance against it but I didn't think it was necessary in this case.... In my lifetime I have purchased 25 cars from General Motors, from authorized franchised dealers, and never questioned their ability to, or legal right to sell me that automobile or worry about General Motors coming and stealing it out of my garage.

Tanger defaulted on the conditional sales contract, and respondent Beech, with the aid of others, seized possession of the aircraft through self help, without petitioner's knowledge or consent.

Thereupon petitioner brought suit in the Superior Court of the State of California for the County of Los Angeles, to establish his title to the aircraft and to recover compenstory and punitive damages against respondents. After trial, the court awarded the aircraft to petitioner along with $175.00 compensatory damages for loss of use and $1,000.00 punitive damages due to respondents' oppressive conduct in seizing possession of the airplane without petitioner's consent. In

reaching this result, the trial court held in effect that the federal government has not occupied the entire field of aircraft title law but merely the recording aspect, and that with respect to priorities between a bona fide purchaser from a merchant in the ordinary course of business and the holder of a prior federally recorded security interest, state law must control. Under California law, the purchaser in the ordinary course of business takes free and clear of the security interest created by his seller. To put the holding in terms of the question presented, the trial court held that the system of recordation of title to aircraft under 49 U.S.C. §1403 does not affect priorities under state law between a prior security holder and a subsequent buyer in the ordinary course of business.

Upon appeal to the Second Appellate District of the California Court of Appeal, the judgment was affirmed except as to the award of punitive damages. The Court of Appeal held that,

> there is nothing in Section 1403 of 49 U.S.C.A. which intends to override a state law providing that a buyer in the ordinary course of business takes free of a security interest created by his seller.

Upon appeal to the Supreme Court of California, the judgment granting possession

of the aircraft and awarding damages to petitioner was reversed. The case was remanded to the trial court to enter judgment for Beech establishing the priority of Beech's security interest in the aircraft. The Supreme Court of California held that the system of recordation of title to aircraft under 49 U.S.C. §1403 does affect priorities established by state law, and that that provision requires that the holder of a prior recorded security interest in a new aircraft must prevail over a subsequent buyer in the ordinary course of business.

ARGUMENT

It is respectfully submitted that certiorari should be granted in this case because the question presented is a federal question of substance not heretofore determined by this Court. The resolution of this question by the California Supreme Court in this case is in conflict with decisions of several United States District Courts which have been called upon to decide the question.

The question is a substantial one because the fact situation presented in this case is typical of aircraft marketing transactions taking place on a daily basis throughout this country.[1] The retail

[1]While there are no statistics informing of the number of aircraft sales which have been made through retail dealers in aircraft, the statistics which are

aircraft dealer finances the acquisition of his inventory by a loan or loans from a bank or other financial institution which is given a security interest in the aircraft in inventory--so called "floor plan" financing. The question is whether a purchaser of an aircraft from the aircraft dealer takes title free of the security interest created by the dealer if the lending institution has filed its security interest for recordation with the Administrator of the Federal Aviation Administration pursuant to 49 U.S.C. §1403.

As the California Supreme Court concedes, "absent the federal recording system and its possible impact on state law, there can be no doubt that [the aircraft dealer] had the power to defeat [the financial institution's] security interest by a sale to a buyer in the ordinary course of business," citing Section 9307 of the California Commercial Code. This section has been adopted in substance in each of

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available are helpful in estimating the scope of the problem. According to the Aircraft Owners and Pilots Association, the major general aviation manufacturers produced 12,581 new aircraft in 1969 with an estimated retail value of 632.2 million dollars, and in 1970 produced 7,420 new aircraft with an estimated retail value of 396.2 million dollars. As of January 1, 1971 there were 137,424 active general aviation aircraft of United States registry. The AOPA PILOT, February 1971, p. 42.

the States of the Union[2] (except Louisiana but including the District of Columbia and the Virgin Islands), and provides, in pertinent part, that, "A buyer in ordinary course of business (subdivision (9) of Section 1201) ... takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." Section 1201, subdivision (9), defines a "buyer in ordinary course of business" as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind...." Also Section 2403 reads in relevant part: " (1) A purchaser of goods acquires all title which his transferor had or had power to transfer....(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

However, the California Supreme Court went on to hold that the buyer must take subject to the security interest because of the application of 49 U.S.C. §1403. This section establishes a federal recording system for the recording of "any

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[2]See generally, Anderson's Uniform Commercial Code, Code Localizer (1968, Supp. 1971).

conveyance which affects the title to, or any interest in, any civil aircraft of the United States," and provides that "each conveyance or other instrument recorded by means of or under the system ... shall from the time of its filing for recordation be valid as to all persons without further or other recordation." The California Supreme Court decided that the prior recorded security interest must prevail over a buyer in the ordinary course of business in order to further the policies expressed in this section.

This decision, and the authorities upon which it relies,[3] are in conflict with

[3]The California Supreme Court relies principally on In re Veterans' Air Express Co., 76 F.Supp. 684 (D.N.J. 1948); Dawson v. General Discount Corporation, 82 Ga.App. 29, 60 S.E.2d 653 (1950); Pope v. National Aero Finance Co., 236 Cal.App.2d 722, 46 Cal.Rptr. 233 (1965); and International Atlas Service, Inc., v. Twentieth Century Aircraft Co., 251 Cal. App.2d 434, 59 Cal.Rptr. 495 (1967) (cert. denied, 389 U.S. 1038), thus focusing on the conflict in the decisions. It also cites as "other cases adopting a view as to priorities based upon the federal recordation provisions": Marsden v. Southern Flight Service, Inc., 227 F.Supp. 411, (M.D.N.C. 1964); United States v. United Aircraft Corporation, 80 F.Supp. 52, (D. Conn. 1948); Smith v. Eastern Airmotive Corp., 99 N.J.Super. 340, 240 A.2d 17,

the decisions of the United States District Courts in Aircraft Investment Corp. v. Pezzani & Reid Equip. Co., 205 F.Supp. 80 (E.D.Mich. 1962); Texas National Bank of Houston v. Aufderheide, 235 F.Supp. 599 (E.D.Ark. 1965); and Northern Illinois Corp. v. Bishop Distributing Co., 284 F. Supp. 121 (W.D.Mich. 1968).

In Aircraft Investment Corp. v. Pezzani & Reid Equip. Co., supra, decided by the Eastern District of Michigan, the defendant ordered a new aircraft from an aircraft retailer. The aircraft retailer "floor plan" financed the new plane, giving a mortgage to the plaintiff lender. It was duly filed for recordation with the Federal Aviation Agency (predecessor to the present Federal Aviation Administration) one day after the defendant completed the purchase and took delivery of the plane. The retailer defaulted on the mortgage and became bankrupt. Plaintiff mortgagee sued defendant purchaser for recovery of the aircraft or the amount owed. A motion for summary judgment by plaintiff was denied on the basis of defendant's affidavit that it

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(1968); rev'd., 108 N.J.Super. 368, 261 A.2d 399 (App.Div. 1970); Crescent City Aviation, Inc. v. Beverly Bank, 139 Ind. App. 669, 219 N.E.2d 446 (1966); Continental Radio Co. v. Continental Bank & Trust Co., 369 S.W.2d 359, (Tex.Civ.App. 1963); and James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657, (Fla. App. 1962).

had no notice of the plaintiff's mortgage until it was recorded. The case is distinguishable because of the mortgagee's late filing, but the following dictum is noteworthy:

> Plaintiff suggests that Congress has pre-empted the entire field of conveyancing of interests in aircraft. This view is erroneous, notwithstanding In re Veterans' Air Express Company, 76 F.Supp. 684 (D.N.J. 1948), which contains dicta on which plaintiff relies. Congress has said only that until an instrument purporting to convey an interest in an aircraft is recorded, in accordance with the Act, it is void as to third parties without notice. Upon federal recordation, it is valid without further recording. In providing for the recordation of various instruments pertaining to transactions affecting title or interest in aircraft, Congress has not impaired the existence and effectiveness of state laws creating and defining such instruments. Excepting the recording section of the Federal Aviation Aviation Act, the validity of the chattel mortgage here in question must be measured by the appropriate state law.

Thus, if the purported chattel

> mortgage is void as to defendant under the appropriate state law, federal recording will not save it. Even if defendant had notice of plaintiff's mortgage, it may still be able to show reliance on conduct by the plaintiff amounting to a waiver of the mortgage lien, as both Texas and Michigan recognize such "waiver." (205 F.Supp. at 82).

Texas National Bank of Houston v. Aufderheide, supra, decided by the Eastern District of Arkansas, presents a fact pattern substantially similar to the case at bar. The mortgagee of a retail aircraft dealer recorded its "floor plan" mortgage with the Federal Aviation Agency before the dealer sold the plane to a bona fide purchaser for value. The purchaser did not search the records of the Federal Aviation Agency, nor did he have actual knowledge or notice of the mortage lien prior to the purchase. The dealer defaulted and the mortgagee sued the purchaser claiming that since its mortgage was duly recorded prior to the purchase, the mortgage lien is valid and superior to the interest of of the purchaser by virtue of 49 U.S.C. §1403. The mortgagee had known of and acquiesced in the dealer's practice of selling mortgaged planes in the ordinary course of business and settling with the mortgagee after the sale. The court held for the purchaser saying:

> The right of Congress to legislate in the field of registration of aircraft and to provide for the recordation of liens upon or conveyances of such craft is not questioned; and the validity as to third persons of conveyances or instruments affecting the title to aircraft, and the relative rights of claimants to such aircraft to the extent that such rights are dependent upon the fact or time of recordation of conveyances or other instruments, are matters which are governed by the federal statute rather than by local law. (Citations omitted.)
>
> It does not follow, however, that section 1403 has repealed or abolished the general rule of chattel mortgage law that when a mortgagee consents to the sale of a mortgaged chattel free of lien by the mortgagor, the purchaser takes free of the mortgage lien and his rights are superior to those of the mortgagee. (Citations omitted.) And a provision in a chattel mortgage prohibiting a sale of the mortgaged chattel without the mortgagee's consent is waived if the mortgagee knowingly permits the violation of such provision. (236 F.Supp. at 603).

The decision in Northern Illinois Corp. v. Bishop Distributing Co., supra, decided

by the Western District of Michigan, is precisely in point to the case at bar. There the plaintiff financed the purchase into inventory of a new aircraft by a retail dealer. Its security agreement with the dealer was duly filed and recorded with the Federal Aviation Agency. The defendant then purchased the aircraft from the dealer in the ordinary course of business. Not long afterward the dealer went bankrupt and the plaintiff sued for a declaration of its rights to the aircraft. The court acknowledged that:

> ... federal law rather than state law governs the rights of claimants to aircraft to the extent that these rights are dependent upon the fact or time of recordation of conveyances. (284 F.Supp. at 124).

Nevertheless, relying on section 9-307 of the Uniform Commercial Code in force in the relevant state jurisdictions, the court held for the purchaser as a buyer in the ordinary course of business. In so doing the District Court was much encouraged by dictum in State Securities Co. v. Aviation Enterprises, Inc., 355 F.2d 225 (10th Cir. 1966). In that case the holder of a security interest in an airplane had not recorded his interest, and the court was, therefore, able to hold for the purchaser from a dealer without having to meet the problem which confronts us. Nevertheless, after quoting relevant portions of 49 U.S. C. §1403, the court said:

> By providing a federal system for registration of conveyances and liens affecting the title to aircraft, Congress has preempted that field and state recording statutes are not applicable to such title instruments. (Footnote omitted.) However, questions of the validity of such title documents, actual notice, good faith purchaser status, and the like, must be resolved under state law. (Footnote omitted). (355 F.2d at 229).

Similar questions of importance involving interpretation of 49 U.S.C. §1403 have provoked the same conflict of interpretation. These questions also involve state laws assigning priorities between interests in aircraft on some basis other than the fact or time of recording. For example, some cases have held that state law giving priority to a repairman's lien over a prior recorded security interest is displaced by the federal recording provisions. In re Veterans' Air Express Co., 76 F.Supp. 684 (D.N.J. 1948); Crescent City Aviation, Inc. v. Beverly Bank, 139 Ind.App. 669, 219 N.E.2d 446 (Ind. App.Ct. 1966); Continental Radio Co. v. Continental Bank & Trust Co., 369 S.W.2d 359 (Tex.Civ. App. 1963); Smith v. Eastern Airmotive Corp., 99 N.J.Super. 340, 240 A.2d 17 (1968). A recent case has criticized this line of cases. In Southern Jersey Airways v. National Bank of Secaucus, 108 N.J.Super. 369,

261 A.2d 399 (App.Div. 1970), the court overruled Smith v. Eastern Airmotive, supra, and held that federal recording of defendant's lien did not accord it priority over a subsequent mechanics lien, and that relative priorities of the parties must be determined in accordance with state law.

The two leading scholarly works on the subject of aircraft lien priorities agree that Congress did not intend the federal recordation system to displace lien priorities established by state law. Scott notes in Liens in Aircraft: Priorities, 25 J. Air Law & Comm. 193, 203 (1958) that "recordation itself merely validates; it does not grant priority." Professor Gilmore's authoritative text says that "state law should apply to determine any questions arising in connection with a security interest in aircraft. The argument for a federal law solution is even weaker here than under any of the other federal statutes we have so far discussed.... [49 U.S.C. §1403] is clearly an 'interstitial' statute, which goes as far as it goes but no further." 1 Gilmore, Security Interests in Personal Property, §13.5, at 426-27.

It is submitted that the California Supreme Court erred in holding that the federal system of aircraft title recordation does affect state law priorities. This Court's attention is invited to the decision of the California Court of Appeal in this case (set out in the Appendix at page 57) in which Presiding Judge Kaus,

after a thorough and scholarly analysis of the legislative history, the scholarly writings, and the case law in point, concludes that "there is nothing in section 1403 of 49 U.S.C.A. which intends to override a state law providing that a buyer in the ordinary course of business takes free of a security interest created by his seller."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

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